**Mohawk Liqueur Company *and* General Industrial Employees Union, Local 42, Distillery, Rectifying, Wine and Allied Workers' International Union, AFL–CIO.** Cases 7–CA–27022, 7–CA–27165, 7–CA–27214, 7–CA–27461, and 7–CA–27592

December 31, l990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 8, 1989, Administrative Law Judge Arline Pacht issued the attached decision. The General Counsel and the Charging Party filed exceptions and briefs in support. The Respondent filed exceptions and a brief in support and an answering brief in response to the General Counsel's and the Charging Party's exceptions and briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order, to modify the recommended remedy, and to adopt the recommended Order as modified.

The complaint alleged, inter alia, that the Respondent violated Section 8(a)(1) of the Act by failing to reinstate and thereafter discharging employee Mary Louise Witmer as a result of her participation in strike activity.[2] The judge found the violation as alleged, and the Respondent excepts. We find merit in the Respondent's exception.

In considering the complaint allegation regarding Witmer, the judge was guided by *GSM, Inc*., 284 NLRB 174 (1987), and *Clear Pine Mouldings*, 268 NLRB 1044 (1984), in light of the balancing doctrine as articulated by the First Circuit in *NLRB v. Thayer*, 213 F.2d 748 (1st Cir. 1954). The judge found that, while on picket duty, Witmer threw stones or pebbles at job applicant Scott Scribner's car as he drove through the picket line, causing $131 in damage. The judge concluded that Witmer's ''conduct comes within the type proscribed in *GSM, Inc*.'' Nonetheless, the judge concluded that, because the Respondent had provided no evidence which indicated that Witmer's misconduct actually intimidated Scribner, or any other employee, the Respondent had no lawful reason to deny Witmer reinstatement. Thus, the judge found that the Respondent violated Section 8(a)(1) by failing to reinstate and by discharging Witmer. We do not agree.

In *Clear Pine Mouldings*, supra, the Board addressed the question of what test should be applied in determining whether an employer may refuse to reinstate a striker based on alleged strike misconduct. There, the Board stated that the test is ''whether the misconduct is such that, under the circumstances existing, it [the misconduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'' Id. at 1046, citing *NLRB v. W. C. McQuaide, Inc*., 552 F.2d 519, 528 (3d Cir. 1977). We find, as indeed the judge found, that Witmer's stone-throwing conduct which caused $131 damage to an automobile was the sort of misconduct which may serve as a ground for discharge under *Clear Pine* and *GSM, Inc*.

In concluding that the Respondent was obligated to reinstate Witmer, the judge applied the *Clear Pine* standard to examine Witmer's misconduct, but in doing so relied on the reactions of particular employees. That was error. The *Clear Pine* standard is an objective one. It does not call for an inquiry into whether any particular employee was actually coerced or intimidated. Rather, the test is applied to determine whether the conduct at issue would reasonably tend to coerce or intimidate an individual faced with such conduct. Under that test, we find, contrary to the judge, that Witmer's action provided a basis for a lawful refusal to reinstate because such stone throwing, under all the circumstances, would reasonably tend to intimidate employees in the exercise of their protected rights.[3]

[1] The judge found that the unfair labor practice strike, which commenced on or about June 1, 1987, converted to an economic strike about August 3. We agree. The General Counsel and the Charging Party except, arguing that the unfair labor practice strike remained as such after August 3 because (1) the Respondent had not, in attempting to remedy its earlier unlawful failure to pay the COLA increase, satisfied the standards set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), for remedying unfair labor practices, and (2) even assuming that the parties were at lawful impasse on and after August 3, the Respondent had failed to restore, at least initially, the conditions existing prior to its unlawful June 1 implementation of its final offer. The General Counsel and the Charging Party contend that the Respondent's failures in these two respects served to prolong the strike.

We reject their first argument for the reason set forth by the judge. Their second argument was not made to the judge, and thus it is questionable whether it may be considered at this time. (At the hearing the General Counsel and Charging Party contended that what concerned the strikers and prolonged the strike was the Respondent's alleged unlawful refusal to supply certain information. This separate 8(a)(5) allegation was dismissed by the judge, and no exceptions have been filed to that dismissal.) Even assuming that the second contention is timely raised, however, we find that the General Counsel failed to establish a nexus between the Respondent's continuing implementation of its final offer and the prolongation of the strike.

[2] The complaint also alleged that the Respondent violated Sec. 8(a)(1) by failing to reinstate and thereafter discharging six other employees because of their strike activities. The judge recommended that these complaint allegations be dismissed. No exceptions were filed to the judge's recommendation concerning these allegations.

[3] It is unclear to what extent the judge actually relied on *NLRB v. Thayer Co*., supra, to arrive at her determination that the Respondent violated Sec. 8(a)(1) of the Act by failing to reinstate, and discharging, Witmer. Basically, under *Thayer*, to determine whether an employee's misconduct forfeits that employee's right to reinstatement, the employer's unfair labor practices (that may have provoked the strike) are balanced against the gravity of the striker misconduct. In *Clear Pine*, supra, the Board plurality opinion rejected this doctrine, but there was no holding on the issue because the vote was split 2–2

*Continued*

Thus, as a direct result of her picket line misconduct, Witmer has forfeited her right to reinstatement. We reverse the judge in this respect and find that the Respondent's failure to reinstate Witmer did not violate Section 8(a)(1) of the Act.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mohawk Liqueur Company, Novi, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(c) and 2(b).

2. Substitute the following for paragraph 2(c).

''(c) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of interest on the COLA payments due to members of the bargaining unit.''

3. Substitute the attached notice for that of the administrative law judge.

on this point. See also *Aztec Bus Line*, 289 NLRB 1021, 1025 (1988). Assuming arguendo that the *Thayer* doctrine should be applied in this case, we nonetheless find that the Respondent did not violate the Act in regard to Witmer. The Respondent's unfair labor practices were not of an egregious nature that could be deemed to have provoked, or could justify, Witmer's stone-throwing misconduct. Chairman Stephens would not apply the balancing test as set out in *Thayer*, although he agrees that immediate provocation must be considered in judging whether a particular action amounts to misconduct that would justify denying reinstatement.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

> Section 7 of the Act gives employees these rights.
>
> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything to interfere with these rights.

WE WILL NOT fail to bargain in good faith by failing and refusing to pay a cost-of-living allowance as provided in our collective-bargaining agreement with the General Industrial Employees Union, Local 42, Distillery, Rectifying, Wine and Allied Workers' International Union, AFL–CIO, as the appropriate bargaining agent of our employees in the appropriate unit described below

> All full-time and regular part-time employees employed by the Employer at its facility located at 42700 Mohawk Drive, Novi, Michigan, but excluding Teamsters, salesmen, professional employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

WE WILL NOT fail to bargain in good faith by insisting to impasse that the Union either bargain about or agree to forgo COLA which is due under an existing collective-bargaining agreement.

WE WILL NOT unilaterally implement changed terms and conditions of employment without reaching a valid impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make employees in the bargaining unit whole for any loss they may have suffered by reason of our delay in paying the COLA due on June 4, 1987, by paying interest on those payments, computed in accordance with Board policy.

### MOHAWK LIQUEUR COMPANY

*Charles Morris, Esq., Richard F. Czubaj, Esq.,* and *James Walter, Esq.* for the General Counsel.

*John S. Schauer, Esq.*, and *Camille A. Olson, Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, for the Respondent.

*Donald B. Greenspon, Esq. (Greenspon, Scheff & Washington)*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Upon charges filed by the General Industrial Employees Union, Local 42, Distillery, Rectifying, Wine and Allied Workers' International Union, AFL–CIO (the Union) on June 4, 1987,[1] as amended on June 29, and upon additional charges filed on July 22, August 4, November 9, December 23, and January 12, 1988, a third order consolidating cases, fourth amended complaint and notice of hearing issued on January 26, 1988, alleging that the Respondent, Mohawk Liqueur Company (Respondent or the Company) committed unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Na-

[1] All dates occurred in 1987 unless otherwise noted.

tional Labor Relations Act (the Act). The Respondent filed timely answers denying that it had violated the Act.

The case came to trial before me in Detroit, Michigan, on April 19–22, July 25–29, and September 7, 1988, during which times the parties had full opportunity to examine and cross-examine witnesses, to introduce documentary evidence,[2] and to argue orally. After considering the witnesses' demeanor, the parties' posttrial briefs, and on the entire record,[3] pursuant to Section 10(c) of the Act, I make the following

## FINDINGS OF FACT

### I. JURISDICTIONAL FINDINGS

Respondent, a Michigan corporation, with an office and place of business in Novi, Michigan, is engaged in the importing, rectifying, nonretail sale and distribution of liqueur, distilled spirits, and related products. During the year ending December 31, 1986, which period is representative of its operation during all times material, Respondent purchased and had delivered to its Novi place of business liqueur and related products valued in excess of $100,000 of which products valued in excess of $50,000 were delivered to its Novi facility directly from places located outside the State of Michigan. During the same time period, Respondent, in the course and conduct of its business operations, sold and distributed at its Novi facility products valued in excess of $100,000, of which products valued in excess of $50,000 were shipped directly to points outside the State. Based on these facts, I find that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is, and has been at all times material, a labor organization within the meaning of 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### Overview

Respondent and the Union, which represents the production and maintenance workers at the Novi plant, have had a collective-bargaining relationship since the 1960s. The dispute in this case arose out of negotiations for a new contract to succeed the one due to expire on midnight May 31, 1987.

Bargaining committees, led by Vernon Frakes, International vice president of the Union, and Jane Downey, director of labor relations for the McKesson Beverage Group,[4] met throughout May without reaching agreement. From the outset, it was clear that the parties were far apart on numerous issues and that bargaining would be difficult because the Company, facing a decline in its competitive position, was seeking far-reaching financial concessions. In the employees' view, the Respondent's proposal to delete COLA payments from the new contract was especially troublesome. At the final bargaining session on May 29, after receiving the Respondent's final offer, the Union realized for the first time that the Company intended to delete COLA not only from the new contract, but also to withhold the COLA payment which was supposed to issue on June 4, 4 days after the agreement expired. A strike commenced on June 1.

The Respondent did not issue the COLA checks on their due date and implemented its final offer. While the strike was in progress, collective bargaining resumed in mid-July. Although the parties were unable to resolve their differences, the Respondent issued the June 4 COLA payments on July 28. Thereafter, at a membership meeting on August 3, the employees voted to continue the strike, justifying their action in part on their belief that the Company had refused to release the names of employees who might be terminated for alleged picket line misconduct. The Respondent maintains that it did not unlawfully withhold information; rather, when the Union made a firm and specific request, the information was provided expeditiously.

The employees submitted an unconditional offer to return to work on August 12. However, having hired permanent replacements on August 5, the Respondent refused to reinstate all the strikers. In the ensuing months, the Respondent held interviews with 12 employees to determine whether they should be reinstated in light of alleged picket line misconduct. After concluding these interviews, six employees were discharged.

Subsequently, in January 1988, the parties executed a collective-bargaining agreement retroactive to June 1, which was a slightly modified version of the Respondent's final offer.

#### The Issues

These facts, set forth in greater detail below, pose the following overarching issues.

1. Was the Respondent's declaration that it would not issue COLA payments on June 4 as provided, and its subsequent withholding of those payments until July 28, a unilateral alteration of the terms and conditions of employment in violation of Section 8(D) and Section 8(a)(1) and (5) of the Act?

2. Was the strike which commenced on June 1 triggered, at least in part, by the Respondent's announcement that it would withhold the June 4 COLA payment, or was the strike caused entirely by economic differences?

3. If the Respondent did violate the Act by refusing to make the June 4 COLA payment, did it subsequently cure its unfair labor practice by issuing the COLA checks on July 28?

4. Did payment of the June 4 COLA increase thereafter convert the strike into one which was solely economic in character?

5. Did Respondent unlawfully refuse to furnish the Union with information as to the identity of strikers who allegedly were under investigation for picket line misconduct? If so,

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[2] Exhibits offered into evidence by counsel for the General Counsel (General Counsel) are cited as G.C. Exh. _____, the Union's exhibits as C.P. Exh. _____, and the Respondent's exhibits as R. Exh. _____.

[3] By motion dated December 29, 1988, Respondent requested leave to supplement the record with a December 6, 1988 determination order of the Michigan Department of Labor and an arbitral decision involving the discharge of a former Mohawk Liqueur employee on the ground that these decisions support its argument in this case that it lawfully withheld a cost-of-living allowance (COLA) payment to employees. The General Counsel and Charging Party filed opposition thereto.

Respondent's motion is denied. The Michigan Department of Labor issued its cursory decision under a statute ''with different definitions, policies and purposes from those of the . . . Act.'' *Central Broadcast Co.*, 280 NLRB 501 fn.1 (1986). Moreover, those decisions are totally silent with regard to the fact-finders' rationale and do not reveal whether the state agency or the arbitrator considered or decided the matters before them in accordance with the dictates of the Act or Board precedent.

[4] McKesson Corporation's Beverage Group has owned and operated Mohawk Liqueur since 1971.

did the strike then continue as an unfair labor practice protest in part because of this refusal?

6. By executing a collective-bargaining agreement in January 1988, which was retroactive to June 1, 1987, did the Union waive its right to any of the remedies prayed for in the complaint?

## Collective Bargaining Prior to the Strike

In March, Local 42 President Ken Hall notified the Company that the Union wanted to renegotiate the parties' contract and was not interested in renewing or extending the current collective-bargaining agreement. Thereafter, the parties arranged their first negotiating session for May 7.

At this first meeting, the parties exchanged proposals and apparently recognized that they were far apart. While the Union was proposing a continuation of cost-of-living allowance (COLA) payments, a three-step wage increase, and other improved terms, the Respondent was seeking extensive concessions including the elimination of the COLA provision and a 10-percent wage reduction.

Since the 1970s the parties' collective-bargaining agreements, including the one which was due to expire on May 31, provided that ''Each employee covered by this Agreement shall receive a cost of living allowance in accordance with the provision get forth in Appendix 'B' attached hereto.'' (G.C. Exh. 2 at 13.) The formula for determining the precise amount and the dates that COLA payments were to issue was spelled out with unmistakable clarity in the appendix. The following chart, extracted verbatim from the agreement, demonstrates that the parties left nothing to chance:

| *Allowance Effective Date* | *Based on Index Published For* | *Date Check Will Be Issued* |
|---|---|---|
| Dec. 1, 1984 | Oct. 1984 | Dec. 4, 1984 |
| June 1, 1985 | Apr. 1985 | June 6, 1985 |
| Nov. 30, 1985 | Oct. 1985 | Dec. 5, 1985 |
| May 31, 1986 | Apr. 1986 | June 6, 1986 |
| Nov. 29, 1986 | Oct. 1986 | Dec. 4, 1986 |
| May 31, 1987 | Apr. 1987 | June 4, 1987 |

The contract further provided that the employees were to receive COLA payments on precise dates for all paid hours worked during the previous 6-month period as specified above. The final COLA payment of June 4 was the only one which was to issue after the agreement expired.

During the May 7 meeting, Frakes asked Downey what the Company meant by the proposal to delete COLA. When Downey answered that article XIII and appendix B would be eliminated from the contract and that there would be no more COLA payments, Frakes commented that this would pose a problem. Nothing further was said by either side about the COLA proposal at this time.

The parties met again on May 15 and 18, but, because Frakes was unable to attend, little of substance was accomplished. Instead, the bargaining committees discussed Respondent's economic problems, particularly the loss of its Hiram Walker bottling business. When Frakes returned to the bargaining table on May 19, time was spent bringing him up to date. At this time, Downey provided him with a copy of the Hiram Walker letter canceling its contract with the Respondent. After reviewing Respondent's other proposals, Frakes speculated that a strike was likely.

Modest movement was made by both sides at the next two sessions on May 20 and 21, but major differences remained on such matters as the COLA payments, wages, mandatory overtime, and seniority. On the morning of May 22, before the sixth bargaining session, Hall obtained strike authorization from the Union's International president, George Orlando, as required by the Union's constitution. At the meeting, Downey provided Frakes with typed copies of several revised proposals which he had requested during a telephone conversation with her the previous evening. Frakes then told Downey that the Union would move from its proposal if the Respondent would do so also. Downey replied that the Company had moved significantly from its initial positions and was waiting for the Union's response.

After caucusing, Frakes advised the Respondent that the Union was rejecting the revised proposals which were received that morning. At this, Downey said, ''It sounds like you're telling me we are at impasse.'' Frakes replied that they were close to it and again asked Downey to prepare the Company's final offer by May 29.[5]

Downey and several members of both the management and union bargaining committees recalled that Frakes also stated at this meeting, that if the COLA provision was not retained, he could not submit the final offer to a membership vote and a strike would result. Frakes denied having made such a comment. In resolving this testimonial conflict, I rely heavily on Downey's notes of this, as well as of other collective-bargaining meetings, which corroborate her testimony. Downey, a highly trained and sophisticated negotiator, was a methodical and meticulous notetaker. While she did not transcribe verbatim conversations, she generally covered all important topics systematically. Since her notes were taken contemporaneously and for business purposes unrelated to litigation, I find that they provide a reliable recordation here. Frakes, on the other hand, frequently suffered from the familiar human failing, forgetfulness, and was seldom permitted to refresh his recollection with his own notes.

As scheduled, a union membership meeting was held on May 28 at which time Frakes reviewed the Company's proposals. Matters of greatest importance to the employees concerned the retention of COLA, wages, and seniority. However, when a vote was taken, the employees did not identify specific strike issues. Rather, by a margin of 59 to 2, they authorized the bargaining committee to call a strike unless the Respondent's final offer changed significantly.[6]

## The May 29 Meeting

On the morning of May 29, Federal Mediator Robert Robb telephoned Downey and agreed to attend the bargaining ses-

[5] Notes taken by employee Witmer, a member of the union bargaining committee, and by Carroll, a member of Respondent's negotiating team, both support Frakes' testimony in this regard.

[6] In its brief, Respondent contends that Local President Hall testified that he reviewed matters such as strike benefits and unemployment compensation at the May 28 meeting. In fact, the transcript shows that Hall initially was confused about the date, but quickly corrected himself to state with certainty that these matters were not raised until after the strike commenced. (Compare Tr. 1103 and 1104.)

sion scheduled later that day. Downey then contacted Frakes to tell him that Robb would be present.[7]

When the session convened, the parties reviewed the status of their original proposals with Robb. At this time, the Union still was requesting a number of changes which were unacceptable to the Respondent, including a 75-cent-an-hour wage increase spread over 3 years, an additional holiday, an increase in vacation time, improvements in the seniority system, increases in disability and severance pay, four additional days of personal leave, and continuation of COLA.

Downey then distributed the Respondent's final offer which retained concessionary terms the Union previously had rejected.[8] The parties differ widely as to the sequence of events and the substance of the dialog during the balance of this meeting.

Downey testified that shortly after she began to review the final offer, but apparently before she reached the wage or COLA provisions, Frakes interrupted to say there would be a strike. Downey asked if this meant they were at impasse. Frakes said they were and stated that pickets would be posted at Sunday, midnight. The union committee then withdrew for a caucus. Frakes denied that he declared an impasse or referred to a strike until after the Union had caucused. Here, too, I rely on Downey's contemporaneous notes to resolve this dispute. The notes confirm her testimony with regard to the sequence of events and are consistent with notes taken by Carroll. Accordingly, I am persuaded that Frakes stated there would be a strike before the Union first caucused at the May 29 meeting.

During their caucus, the members of the union bargaining committee began carefully to review the final offer. Jim Thersson, member of the union team, called the committee's attention to a note in the final offer which, in his words, struck them like a ''bombshell.'' Specifically, the note stated: ''The cost of living allowance which is effective as of May 31, 1987, and payable on June 4, 1987, will not be paid.'' (G.C. Exh. 6 at 10.)

Frakes returned to the meeting room to ask Downey if the note was an error. Protesting that the employees were owed that payment for the last 6 months of work, he said that the Respondent's action created an unfair labor practice strike and that without the June COLA payment, he could not submit the Company's final offer back to the union members for a vote.

Downey testified that she told Frakes the June COLA payment was one of a number of economic items over which the parties were at impasse and that he previously told her he was not going to ask for a vote on the final offer unless COLA payments were continued. She then asked Frakes whether the Union would accept the contract and abstain from striking if the Respondent made the June 4 COLA payments. Downey and Carroll maintained that Frakes said no, that there would be a strike. At this, Downey told him that since the parties were at impasse Respondent would implement its final offer on June 1.

Frakes agreed that Downey asked him if the Union would accept the final offer if the June 4 COLA payments were made, but he answered: ''I don't know.'' He further related that when he reported Downey's comments to the bargaining committee the members no longer wished to negotiate. Before the meeting ended and with the union bargaining committee present, Frakes testified that he asked Downey if she was willing to make the COLA payments and whether it would serve any purpose to negotiate over the weekend. According to Frakes, she replied negatively, stating that the Union had the final offer and nothing would change over the weekend. However, in an affidavit supplied to an NLRB investigator shortly after the events in question, Frakes avowed that he told Downey it would do no good to negotiate over the weekend in light of the Respondent's final offer. Given these contradictory statements, I rely instead on Downey's clearer and more consistent account as set forth above.

Although the record does not show exactly when the members of the bargaining committee realized that the final offer included a wage reduction of 5 percent rather than 10 percent as originally proposed, it apparently was sometime after they discovered Respondent's intent to withhold the June 4 COLA checks. Frakes stated at the trial that given the 5-percent wage change he would have submitted the final offer to a membership vote were it not for the Company's stance on the June 4 COLA payment.

After the meeting ended, Thersson and another bargaining committee employee, Howard Kaechle, went to the plant to tell the exiting employees that a strike was being called because the Company had decided to withhold their June COLA checks.

### The Strike Begins

Strikers started to picket the facility on June 1. The following day, they began carrying placards identifying the protest as an unfair labor practice strike.[9] Soon after the strike began, Hall advised the employees about strike benefits, unemployment compensation, and other related matters.

Frakes and Downey had no contact in June.[10] However, Downey spoke by phone with Union President Orlando on June 29 at which time she agreed to give him notice before the Respondent hired permanent replacements. As promised, letters were sent to the union leadership on July 1, advising that the Company would hire permanent replacements unless the unit members returned to work by July 9. Similar letters were sent to the strikers the following day. No one responded to these letters.

At Frakes' request, the mediator assisted in scheduling a bargaining meeting for July 15. In full session, the Union made a new offer which receded from its earlier economic demands. However, the Union continued to seek payment of the June 4 COLA wages. Downey responded that the

[7] Union and management representatives both denied initiating the request for a mediator's presence at the May 29 meeting. Since even before bargaining began, both the state and Federal mediation services were told when negotiations would begin and when the contract expired, it is altogether likely that Robb himself initiated the call to Downey, knowing that the expiration date was just a few days away.

[8] Included among the Company's rejected proposals was a lengthened probationary period, revised seniority rights, limitations on overtime and vacation pay, a shared payment rather than company funded health plan, and the end of COLA.

[9] Hall testified without dispute that he ordered the picket signs after the meeting ended on May 29.

[10] Frakes initially testified that he had a telephone conversation with Downey sometime in June at which time he made his first request for the names of strikers who would be discharged. He also referred to a call with Downey on June 16 in an affidavit. When probed about this call on cross-examination, he finally realized that the reference to this date in his affidavit probably was an error. Downey was certain that she did not talk with Frakes until July 9.

Union's new offer gave the Company no reason to alter its final offer.

After caucusing, Frakes returned with another proposal which accepted the final offer as a starting point. In brief, the Union asked for several modifications including a deletion of the mandatory overtime requirement, a wage freeze, more sick and personal days off, 1000 qualifying hours for vacation pay, and payment of the June 4 COLA. Downey agreed to confer with other management officials about the Union's proposals, whereupon they agreed to reconvene the next day.[11]

### The Union's Request for Information

Sometime after the July 16 meeting began, the question of which employees might be discharged for picket line misconduct arose. Frakes described a fairly extensive exchange with Downey on this matter. He said that the topic arose when he told Downey he would present the contract to the union members for a vote if all of them were taken back to work. Downey told him that not all the striking employees would have jobs because the Company had hired some replacements. Then, he asked how many people were involved in picket line misconduct. (At another point in his testimony, Frakes stated that during this meeting he asked Downey for the names of the three people who, during a prior telephone call, she had indicated would be discharged.) When Downey purportedly replied that six persons were under investigation and that there might be more. He asked who they were. She answered that they were still under investigation. Frakes said that he insisted on having the names so that he could tell the membership who was discharged before asking them to vote on the final offer. However, Downey refused his request, saying she was unprepared to give him that information.

Downey gave a briefer account of their exchange. She acknowledged that Frakes asked if anyone would be discharged, and if so, who; but that was all he asked. She told him that some people might be discharged, but that no decisions had been made, and would not be, until the facts were reviewed and the employees given an opportunity to present their side of the story.

On cross-examination, Frakes admitted that Downey told him the Company could not give him any names because no decisions about discharges had been made; that no decisions would be made until the Company reviewed all the evidence, and that each person involved was given a chance to present his or her defense. Yet, he also maintained that it was at this meeting that Downey told him that either three or six employees would be discharged. It is difficult to believe that Downey said no decisions had been made, as Frakes admitted, and at the same time also believe that she said that Respondent would fire three or six employees. Frakes apparently was confused both about the dates and contents of these discussions. In contrast, Downey was clear and consistent. Her notes and those of Carroll's support her account, while notes of the July 16 meeting taken by Union Secretary Susan Greene contain no reference to a request for information. Accordingly, I rely on Downey's recollection with respect to this first request for information.

As the July 16 meeting was ending and after the Respondent made two minor revisions to its final offer, Frakes asked Downey whether Respondent would pay the June 4 COLA if the employees accepted the final offer. When she asked Frakes if he was making a proposal, she received no response.

Frakes and Downey next talked by phone on July 23. In substance, Frakes asked whether all the employees could return to work and receive the June COLA payments if they ratified the final offer. Downey pointed out that the Company had hired permanent replacements, but agreed to review the matter with her superiors.

### Respondent's Payment of COLA

When Downey and Frakes next spoke by phone on July 27, she informed him that the Company was issuing COLA checks to the workers. When Frakes again asked whether everyone could return to work, Downey noted that no one had offered to return yet for whom there were no jobs. Frakes then suggested that any discharge which the Union disputed could be resolved through the grievance procedure. At Frakes' request, Downey provided her itinerary and telephone numbers for the coming week.

On July 28, the Respondent mailed COLA checks to the union members with a cover letter which stated in pertinent part:

> The . . . National Labor Relations Board decided that there was a legal issue as to our bargaining on the June 4th COLA payment. No final determination . . . has been made, and it is the position of Mohawk . . . that our bargaining in respect to the June 4th payment was proper.
>
> . . . regardless of who is right or wrong, we have made the June 4th payment. It is no longer an issue in negotiations.
>
> We recognize your right to strike . . . If you decide to continue your strike, we will take steps to continue our business, including steps to permanently replace those who have not returned to work by August 4. [G.C. Exh. 5.]

### The Strike Ends

In light of the Company's payment of COLA and offer to reinstate the striking employees, the Union called a membership meeting for August 3. Although witnesses' memories of this gathering had faded by the time of trial, Union Secretary Greene was able to locate her handwritten and typewritten notes of the meeting, which afford the only contemporaneous record of what may have occurred.[12] These notes indicate that the members wanted to return to work in ap-

[11] On direct examination, Frakes indicated that during the July 15 meeting he asked Downey about granting amnesty; that is, taking back all the workers. She responded that they were investigating six employees for picket line misconduct, but when he asked for their names she would not release them, explaining that they were still under investigation. On cross-examination 2 days later, Frakes reported that this exchange (with some variations) took place on July 16.

[12] Another member of the bargaining committee, Rachel Navarro, also appeared as a witness and was questioned about the August 3 meeting. However, as she herself admitted, her recall at trial, more than a year after the events in question, was far from perfect. Her testimony also suffered from her inability to separate her personal reactions from actual discourse. Accordingly, I am compelled to disregard her testimony.

proximately 10 days, with amnesty.[13] However Frakes told the group that the Company would not grant amnesty, and had advised him that ''there are six people they will not take back because of supposed actions on the picket line (possibly more than six people).'' (G.C. Exh. 26.) Notwithstanding the above-quoted comment from Greene's notes, which she typed several days after the meeting, she testified at trial that Frakes referred to six people who were going to be ''investigated'' rather than discharged for picket line misconduct.

Greene next reported that the Union's counsel explained the unfair labor practice charge which had been filed with the Board. He also informed the group that the Agency had not determined whether the strike would be considered an unfair labor practice or economic action. Frakes then told the members that Respondent had violated the Act by not submitting the names of those they would not take back. However, he assured them that the Union had requested their names and reasons for their discharges and intended to file another unfair labor practice charge about this.

Greene's notes indicate that counsel explained that the employees could either continue the strike, accept the final offer, or return to work without a contract. Thereafter, the members voted unanimously to remain on strike and await a report on further negotiations scheduled for August 11.[14] When testifying, Greene embellished her sketchy notes by stating that the motion was ''to remain on strike until the August 11th negotiation meetings and with the hopes that the Negotiating Committee could come back with a negotiated COLA with amnesty for their members . . . and also the names of people that were being charged with misconduct on the picket line.'' Frakes' recollection of this meeting was somewhat vague, but he too recalled that employees expressed concern about voting on the contract before knowing who would be terminated. Given their concern, he believed that the members voted to remain on strike to see whether the bargaining committee could obtain the names of those to be discharged, convince Respondent to grant amnesty, and add COLA to their final offer at the bargaining session set for August 11.

As he told the membership, Frakes sent a letter by regular mail to Downey at her San Francisco office on August 3 stating:

> At one of our negotiating sessions on July 7, 1987, and again in a telephone conversation . . . on July 28 . . . I requested information regarding striking employees who, according to the Employer have forfeited their reinstatement rights due to misconduct during the strike. You refused my requests on both occasions. Since this issue is of major concern to the Union, is a stumbling block in our negotiations, and since the Union needs this information to conduct its own investigation . . . I am, for the third time requesting this information. Specifically . . . the names of the strikers who allegedly committed acts of misconduct, the dates . . . and what the alleged . . . misconduct consisted of. (G.C. Exh. 8.)

The following day, August 4, Frakes mailed a second letter to Downey which was identical to the first except that it set forth corrected dates showing that the information requests were made on July 16 and 27, rather than July 7 and 28. On the same day, the Union filed another unfair labor practice charge alleging that the Respondent had failed to bargain in good faith by refusing to provide the Union with information regarding striking employees who the Company claimed forfeited their reinstatement rights by misconduct during the strike. (G.C. Exh. l(i).)

Downey first learned of the Union's August 3 letter when it reached her office on August 7. However, Frakes and Downey did not speak again until the bargaining meeting of August 11.[15] She arrived late, after she and Patrick Luskey, Respondent's vice president and general manager of operations, spent the morning reviewing materials pertaining to alleged picket line misconduct in order to respond to the Union's request.[16]

At the outset of the August 11 meeting, Frakes asked whether the Respondent had modified its amended final offer and whether the Company would grant amnesty to all the employees. Downey testified that when she pointed out that this was the first time he had used the word amnesty Frakes erupted in an angry tirade, prompting her to walk out of the meeting. Frakes followed and apologized for his outburst, explaining that he was putting on a show for his committee. During this recess, Downey gave Frakes the requested information, repeated that decisions would be made only after the 12 employees on the list were interviewed, and agreed that either he or Hall could be present.[17]

Frakes denied Downey's account of their contretemps. Instead, he stated that he asked whether the employees would be taken back to work if they accepted the contract. Downey responded that the Company had hired permanent replacements and would take the striking employees back as needed. He then asked how many employees were discharged to which she replied, ''12.'' When he remarked that it had jumped from six, Downey denied that she had ever mentioned that number. Frakes then retorted, ''Well, I recall you saying six.'' (Tr. 117.) He said that their angry exchange was mutual and that he apologized later, but only as a courtesy. Although Frakes' detailed account of the remarks which immediately preceded their dispute do not appear in Downey's notes, it may be that she failed to record every word uttered during these heated moments. However, it makes no sense that Downey would announce that 12 employees would be discharged, and minutes later, emphasize that discharge decisions would be made only after the employees were interviewed. Thus, logic leads me to accept Downey's account of this scene.

### The Strike Ends; the Contract is Signed

At the union membership meeting on August 12, the employees were told that the Respondent would not alter its

[13] Greene's typed notes omit her handwritten reference to the members' interest in returning to work ''l wk Thursday,'' which I interpret to mean 1 week from the coming Thursday, August 13. (Compare G.C. Exhs. 25 and 26.)

[14] Greene's handwritten notes contain a comment, ''report back after 8–11'' which does not appear in the typed version.

[15] Downey was traveling for business reasons and learned of the letter when she telephoned her office on August 7.

[16] The Union did not send a copy of the request for information to Luskey. He first learned of the request on August 6 after receiving a copy of the unfair labor practice charge which the Union filed with the Board.

[17] Respondent eventually discharged 6 of the 12 persons on the list provided to Frakes, after conducting individual interviews with them in August and September. The allegations concerning these discharges will be discussed in detail below.

final offer, that the interviews would be conducted with 12 strikers before any discharges occurred, and that approximately 48 permanent replacements had been hired as of August 10. With the COLA checks issued and information about those charged with picket line misconduct in hand, the employees voted to make an unconditional offer to return to work on August 14 without a contract. Frakes acknowledged that although the employees still were dissatisfied with the final offer, the consensus was to offer to return quickly in an effort to defuse a decertification petition circulating in the plant.

The parties engaged in one more bargaining session on September 17. On November 25, the union members ratified the final offer and in January the parties executed the collective-bargaining agreement, retroactive to June 1, 1987. The contract specifically provides in pertinent part that:

> This Agreement shall become effective as of June 1, 1987 and shall remain in . . . effect through May 31, 1990.
>
> This Agreement is made in full belief by both parties thereto that it is in every respect legal. If any section, clause or sentence of this Agreement is for any reason held to be invalid, such a decision shall not affect the remaining portions of this Agreement.
>
> All rights and duties of both parties are specifically expressed in this Agreement and such expression is all inclusive and supersedes all prior written or oral agreements . . . and concludes the obligation for collective bargaining for its term.

## III. DECISION AND CONCLUDING FINDINGS

### Respondent Violated the Act by Withholding Cola

### The June 4 COLA was an Accrued Right Under the Existing Contract

The threshhold question here centers on whether Respondent was obligated to make COLA payments to the employees on June 4, even though the parties' collective-bargaining agreement expired on May 31. The General Counsel and the Charging Party argue that the COLA adjustment was a vested term of an extant collective-bargaining agreement. As such, the argument continues, it was a permissive subject of bargaining over which impasse could not lawfully be reached. Moreover, the Respondent's failure to pay the June COLA was a unilateral change in the terms of the then-extant agreement. Respondent contends that since it had no duty to make a COLA payment after the agreement expired the continuation of a COLA provision in the succeeding contract, including the June 4 COLA, was a mandatory subject of bargaining over which the parties reached impasse. Accordingly, it lawfully implemented its final offer, which included the elimination of all COLA payments, including the one otherwise due on June 4.

In support of the position that the COLA payment was a vested benefit owed under the terms of the 1984–1987 labor contract, the General Counsel and Charging Party cite *Meilman Food Industries*, 234 NLRB 698 (1978), enfd. mem. 593 F.2d 1371 (D.C. Cir. 1979). In *Meilman*, the article of the collective-bargaining agreement which expired on December 6, 1974, read that if the consumer price index exceeded a certain level on specified dates within the life of the contract, then the COLA payment was due on or after July 1 and January 1. The Board concluded that the cost-of-living adjustment had accrued even though its effective date fell after the expiration of the collective-bargaining agreement. In so ruling, the Board stressed that the agreement clearly established that the relevant time for determining when the adjustment accrued was the review date which fell within the life of the agreement. 234 NLRB at 698, 704. Basing its decision on the explicit language of the agreement, which is ''clear on its face and requires no construction or interpretation beyond its plain meaning,'' the Board held that the adjustment was due and payable. Therefore, the failure to pay the COLA was a unilateral change in the existing wage structure in violation of Section 8(a)(1) and (5). Id. at 698.

The Board and the courts have considered this same issue in two subsequent cases. In *Struthers Wells Corp*., 262 NLRB 1080 (1982), the Board ruled that the employer was obliged under a contract which expired on November 1, 1980, to pay COLA due in January 1981, based on a consumer price index set the preceding November 15. The court of appeals denied enforcement of the Board's Order, specifically finding that since both the calculation period and the payment date occurred after the contract's life the COLA payment was not an ''existing term and condition of employment that survived the expiration of the . . . agreement.'' 721 F.2d.465, 472 (3d Cir. 1983).

More recently, in *Harvstone Mfg. Corp*., 272 NLRB 939 (1984), the Board again found that an employer was obligated to pay COLA effective on September 1, 1982, where the parties' collective-bargaining agreement expired 1 day earlier, on August 31. The Court of Appeals for the Seventh Circuit denied enforcement, finding that, unlike *Meilman*, in which the review dates were ''definitely established, the review dates in *Harvstone*: lacked concreteness since they were to occur'' sometime following the publication of the consumer price index for the particular period. This lack of a concrete review date was critical to the circuit court's conclusion that:

> There is no language in the agreement establishing the review dates as the time at which the cost-of-living adjustments became contractually enforceable rights. [T]he review dates have no significance in determining the Respondent's obligations to pay the cost-of-living adjustments. We therefore find that the Respondent's contractual duty to pay such adjustments arose, and the employees' rights to such adjustments accrued, only on the effective dates during the life of the agreements. Since the September 1, 1982 effective date occurred after the expiration of the . . . bargaining agreements, the Respondents were not obligated to pay the adjustment in question. [785 F.2d at 580–581.]

The lesson derived from the above-cited cases is that an employer's obligation to pay a cost-of-living adjustment due after an agreement expires will turn on the specific language of the COLA provision contained in each collective-bargaining agreement. In the instant case, the cost-of-living increase clearly was determined on a fixed and certain date within the term of the parties' collective-bargaining agreement. It was

effective on May 31, which may have been the final date of the contract, but was within the life of the agreement, nonetheless. Thus, under the rationale of any of the above-cited cases, the COLA payment here was an accrued benefit within the term of the 1984–1987 contract.

Respondent relies on the court of appeals' decision in *Harvstone*, to argue that it had no duty to make the final COLA payment and could bargain to impasse about it because it was payable 4 days after the contract expired. Respondent's reliance on the appellate decision in *Harvstone* is misplaced. As discussed above, the court reasoned that the measurement date was imprecise and the effective date in the *Harvstone* contract fell outside the term of the labor agreement. In the present case, the only date to fall beyond the term of the parties' agreement was the date the COLA checks were to issue. The June 4 payment date simply served as a deadline by which time the Respondent had agreed and was bound to complete rather perfunctory mathematic calculations based on hours worked within the life of the contract. This required ''no employer discretion whatsoever.'' *Meilman Food Industries*, supra at 706. The date when checks were supposed to issue under the just expired agreement should not be confused with the effective date of May 31 when COLA vested for all hours worked in the preceding 6-month period. As the administrative law judge observed in *Harvstone*: ''Such previously negotiated contractual provisions, to take effect during or even after the term of the contract, are binding and do not require reincorporation into a further contract.'' The Union was not required to ''rebargain that which has already been secured by a binding past agreement.'' 272 NLRB at 943.

### Respondent's Decision to Withhold COLA Constituted a Refusal to Bargain

Under Sections 8(a)(5) and 8(d) of the Act, an employer may not unilaterally terminate or modify a collective-bargaining agreement governing wages, hours, and other terms and conditions of employment during the term of that agreement without first providing the representative of its employees an opportunity to bargain concerning the proposed changes. *NLRB v. Katz*, 369 U.S. 736, 741–748 (1962).

Section 8(d) further provides that no party to an agreement shall be required ''to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.'' In other words, unless there is an express provision to reopen the contract, neither party may insist upon a modification of the agreement during its term. Thus, while an employer may propose midterm modifications of a current collective-bargaining agreement a union need not assent to proposed changes and is not obliged to bargain about them during the contract term. An employer violates 8(a)(1) and (5) by altering any term of a collective-bargaining agreement governing a mandatory subject of bargaining without obtaining the consent of the union, even if the reason for the change is financial difficulty. *Standard Fittings Co. v. NLRB*, 845 F.2d 1311 (5th Cir. 1988).

Having found above that the June COLA payment was an express term of the parties' executed collective-bargaining agreement, it follows, pursuant to Section 8(d) of the Act, that the Union had no duty to bargain about it, much less to acquiesce. Without the Union's consent, the Respondent's unilateral decision to eliminate the COLA payment automatically constituted a refusal to bargain in violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Standard Fittings*, supra; *Meilman Industries*, supra. Therefore, whether the parties bargained to impasse on the elimination of the June 4 COLA payment is irrelevant for the Union was not obliged to bargain at all where the proposal concerned changing a mandatory and vested term of employment. Ibid.

The Respondent contends that it did not violate the Act by conditioning bargaining on the Union's acceptance of its June 4 COLA proposal as alleged in the complaint. Respondent submits that in actuality, it did nothing more than include a proposal to abolish the June COLA payment as part of a series of proposals to revise the expiring contract. Even if Respondent's contention is factually correct, its legal premise is in error.[18]

To demonstrate its willingness to bargain about the June 4 COLA issue, Respondent points out that Downey encouraged Frakes to counteroffer at the May 29 meeting. Thus, she asked whether the Union would agree to the final offer if the Company withdrew the June 4 COLA proposal. Because the Union had an absolute right to resist bargaining over any change to the June COLA, Respondent's readiness to bargain is completely irrelevant. Indeed, Respondent's error was to retain its June 4 COLA proposal as a bargainable issue in the face of union resistance.

Moreover, the Company's willingness to negotiate about its June 4 proposal came at a steep price: the Union's acceptance of the final offer. In other words, Respondent used the June 4 COLA as a bargaining chip. By retaining and implementing this onerous condition as a lever to extract acceptance of its final offer, Respondent engaged in bad-faith bargaining.[19]

The Respondent asserts that its proposal to delete the June 4 COLA payment was based on a good-faith and arguably sound interpretation of the expired labor agreement. Citing *NCR Corp.*, 271 NLRB 1212 (1984), Respondent submits that the instant controversy is nothing more than a contract dispute which presents no evidence of antiunion animus or bad faith.

Addressing a similar assertion in *Meilman*, supra at 705–706, the administrative law judge aptly wrote: ''the resolution of this dispute does not turn on the interpretation of a contract clause. Where, as here, the issue involves a legal matter arising from the obligation under the Act to refrain from changing the conditions of employment, such is within the special competence of the Board.'' As in *Meilman*, what is in issue here is adherence to the command of Section 8(d) that no party to an agreement shall be required ''to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period.''

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[18] Respondent claimed it was always ready to bargain about its June 4 COLA proposal; yet, the decision to abolish it was presented in the final offer as if it were a fait accompli. Moreover, Downey pointed out to Frakes that as a rule, Respondent did not alter the terms of a final offer.

[19] Unlike the General Counsel who characterizes the Respondent's June 4 COLA demand as a nonmandatory subject of bargaining, the Charging Party contends that the demand, was, in fact, illegal since to accede to it, would require the Union to commit an unlawful act under Federal and state law. Because the complaint did not allege that the Respondent's conduct was illegal, and the question of illegality was not litigated at the instant hearing, it is inappropriate to consider the Charging Party's argument here.

Like the COLA provision in *Meilman*, the COLA clause in the present dispute was clear on its face. No serious contention can be raised that the effective date, expressly set forth as May 31, was not within the term of the current agreement. Moreover, the COLA clause in the unexpired contract was not marred by vagueness which troubled the Circuit Court in *Harvstone*. Thus, the straight forward contractual provision here bears no resemblance to those at issue in *NCR Corp*. supra, where the Board found that two separate and ambiguous articles in the agreement admittedly gave rise to conflicting and equally plausible interpretations.

In *NCR*, the Board observed that as additional evidence of its good faith, the employer gave the union 4 months' notice of its intent to introduce changes in accordance with its construction of the labor agreement. In contrast, the Respondent's last minute announcement that the June 4 COLA would be deleted undermines its claim of good faith. Respondent suggests that it gave the Union adequate notice of its intent to withdraw the June 4 COLA on May 7 in its first set of contract proposals. However, that proposal referred solely to the deletion of article XIII and appendix B in the new contract; it was silent about the June 4 COLA payment. If Respondent wanted to alert the Union from the outset that it intended to cancel the June cost-of-living increase, Downey could have done so in unambiguous terms just as she did in the final offer. Respondent surely had to suspect that its decision to cancel the June 4 COLA payment would hit the Union like the proverbial ''bombshell.'' By reserving its stunning announcement for the 11th hour and by conditioning receipt of the June 4 COLA on the employees' acceptance of its final offer Respondent engaged in bargaining tactics that do not comport with the requirements of Section 8(d) of the Act.

In the final analysis, by acting upon its proposal to abolish the June 4 COLA, Respondent unilaterally altered the existing wage structure. This conduct automatically violates Section 8(a)(1) and (5) despite the possibility of overall subjective good faith. See *Chemical Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 183–188 (1971); *NLRB v. Katz*, 369 U.S. 736, 747 (1962).[20]

### Respondent's Position on the June 4 COLA Precluded Impasse

As a general rule, an employer may implement changed terms and conditions of employment unilaterally after bargaining has reached impasse. However, there can be no ''legally cognizable impasse . . . if a cause of the deadlock is the failure of one of the parties to bargain in good faith.'' *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). Therefore, where an employer's failure to bargain in good faith has obstructed the bargaining process, the employer may not rely on a resulting impasse to justify unilateral changes in wages or other terms of employment. Id. at 964.

As found above, Respondent failed to bargain in good faith by proposing to eliminate the employees' vested right to a sizeable COLA payment, ranging from $2000 to $2500 each. However, a separate question arises as to whether Respondent's unlawful conduct obstructed the bargaining process.

In addressing this question, a brief recapitulation of the pertinent facts is in order. At the outset of the May 29 bargaining meeting, the parties differed on a number of issues involving mandatory subjects. The Union was not yet aware of the Company's June 4 COLA ultimatum. Soon after Respondent tendered its final proposal, Frakes said the parties were at impasse and a strike would ensue. He and the union bargaining committee then caucused to review the balance of the final offer. It was at this time that the Union first discovered the Company's intent to withhold the June 4 COLA checks. Frakes immediately asked Downey whether the Respondent meant what it said and protested the Company's action. Downey responded by asking Frakes whether the Union would accept the final offer if COLA was paid. Frakes rightfully refused to negotiate about the June 4 payment and concluded negotiations. A strike commenced on June 1.

Respondent points out that the Union had declared an impasse even before realizing that the Company intended to eliminate the June 4 COLA; therefore, the differences between the parties were so numerous and severe that impasse was inevitable with or without the June 4 COLA issue. Respondent submits that because the June 4 COLA proposal was not a contributing cause of the impasse, it was free to unilaterally implement its final offer.

As the facts recited above show, Frakes did announce an impasse just before the union team left the meeting room on May 29 to caucus. However, his premature declaration was not necessarily binding. Even at that juncture, a strike was not inevitable. It is important to bear in mind that prior to interrupting the bargaining in order to caucus, the union negotiators had not reviewed Respondent's final offer in its entirety and had not discovered that Respondent had integrated the elimination of the June 4 COLA payment into its final offer package. If on returning to the meeting room to question Downey about the June 4 COLA proposal, Frakes had been assured that Respondent had erred and would make the payment and also was advised that the Company had improved its wage proposal, the Union might have become more conciliatory and continued to negotiate at least over the weekend. However, that did not happen and it is impossible to say now what course negotiations would have taken if it had. By presenting a final offer which included its intent to withhold a vested COLA payment, Respondent insinuated an unlawful issue into the bargaining process. Furthermore, Respondent conditioned the performance of its lawful duty to pay the June 4 COLA on the Union's acceptance of the balance of the final offer, thereby inextricably linking bargainable with nonbargainable terms. When it discontinued negotiations on the entire final offer package, which incorporated the nonbargainable term, the Union acted within its rights. The Union did not have to bargain about what already was owed to the employees. Since impasse results only after good-faith bargaining takes place, impasse did not and could not occur as a result of what took place on May 29. Given these circumstances, it is impossible to determine whether bargaining might have continued and impasse averted. See

[20] Respondent's reliance on *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); and *Nuclear Fuel Services*, 290 NLRB 309 (1988), is misplaced for those cases discuss antiunion motivation in the context of 8(a)(3) violations. Even if under the *Great Dane* test, Respondent had produced substantial business justification (which it has not), fiscal distress does not excuse an employer's obligations under an existing contract. *Standard Fittings Co. v. NLRB*, supra.

*Latrobe Steel Co*., 244 NLRB 528, 533 (1979). Therefore, under well-settled principles, the Respondent may not rely on an impasse brought about in part by its own unlawful conduct to justify unilaterally changing terms and conditions of employment.[21] See *NLRB v. Katz*, supra. In doing so, Respondent violated Section 8(a)(1) and (5). *Gaso Pumps, Inc*., 274 NLRB 532 (1985).

Respondent cites certain cases such as *Taft Broadcasting Co*., supra, to support the claim that it was privileged to act unilaterally. These cases are inapposite here because unlike the instant proceeding which involves a proposal concerning a midterm modification, the authorities cited by the Respondent deal with bargaining over terms not yet settled by contract.

### The Strike was Caused, at Least in Part, by Respondent's Unfair Labor Practice

An unfair labor practice strike is one which is precipitated in whole or in part by an unfair labor practice. A strike which starts out in support of economic objectives may become an unfair labor practice strike if an employer commits an intervening unfair labor practice which is found to have prolonged the strike or ''is likely to have significantly interrupted or burdened the course of the bargaining process. ''*C-Line Express*, 292 NLRB 638 (1989). The Board and the courts consistently have required that the unlawful conduct be a factor (not necessarily the sole or predominant one) which caused or prolonged the work stoppage, but a causal connection is not established by a mere coincidence in time. *Tufts Bros*., 235 NLRB 808, 810 (1978); *Reichhold Chemicals*, 288 NLRB 69 (1988). In the instant case, the Respondent committed an unfair labor practice by proposing to delete the June 4 COLA and soon thereafter the employees commenced a strike. The question here is whether Respondent's unlawful act was a contributing cause of the strike.

Recently, the Board acknowledged that its search for this causal link is often problematic, causing it to rely on both objective and subjective considerations. *C-Line Express*, supra at 638. In addition, the Board observed that:

> Certain types of unfair labor practices by their nature will have a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis for finding conversion. . . . The common thread running through these cases is the judgment of the Board that the employer's conduct is likely to have significantly interrupted or burdened the course of the bargaining process. [Id. at 638.]

The record in this case supports the conclusion that Respondent's unfair labor practice was a contributing cause of the strike.

Clearly, the parties were far apart on a number of economic issues throughout the course of negotiations. However, prior to the bargaining meeting on May 29, the union members had taken no actions which necessarily made the strike inevitable. Thus, the employees did not identify specific strike issues or cast a definitive strike vote at the May 28 membership meeting. Rather, the vote was conditional; that is, the bargaining committee was authorized to call a strike if the Respondent's final offer did not contain significant change. Therefore, the prestrike vote in this case does not prove whether or not the the June 4 COLA proposal was a motivating factor driving the employees to strike. Cf. *Reichhold Chemicals*, supra, where the Board found that the employer's unlawful proposal was not presented to employees at strike vote meetings and therefore played no part in their decision to strike.

Significantly, the Union did not arrange to have a mediator attend the May 29 meeting, a prerequisite which Frakes understood was essential to obtaining strike sanction and financial support from the International. Further, the Local had not taken other steps which generally are associated with strike preparation. No assignments were made for picket line duty; employees were not advised about strike benefits, and picket line signs or posters were not ordered until after the May 29 meeting. Such conduct is not customary if employees have a concrete and fixed strike date in mind.

Given this absence of strike preparation, it is fair to infer that the union negotiators were seeking some change in the Respondent's offer that would justify postponing a strike, at least so that the parties could bargain through the weekend to the contract's expiration date of May 31. Even though Frakes indicated a strike would ensue when he first left the bargaining table on May 29, it bears repeating that he made this statement before he had reviewed the entire document and consulted with the rest of his committee. As I concluded above, it is now impossible to state with certainty whether or not the Union might have continued to negotiate even for several more days and avoided a strike were it not for the Respondent's demand that the employees forfeit their COLA checks.

There can be no uncertainty that the Respondent's position on denying the June 4 COLA payment elicited immediate and intense employee reaction which fueled commitment to a strike. Thersson's comment that the announcement hit them like a bombshell surely reflected his coworkers' sentiments when they too learned that they would be deprived of over $2000 for work already performed. Frakes instantly protested the Respondent's proposal, telling Downey that the employees would be engaged in an unfair labor practice strike. Significantly, Frakes did not withdraw from negotiations until after the employees discovered Respondent's scheme to withhold the June 4 COLA. Again, speculation would be required to say that the parties could not have made significant progress toward agreement by bargaining throughout the weekend were it not for the Company's unlawful demand.

On the afternoon of May 29, the entire work force was told that the strike was being called to protest Respondent's action on the June COLA payment. One employee, Patricia Gomez, recalled that Howard Kaechle, a member of the bargaining committee, explained that if the employees accepted the final offer, they would not receive the COLA checks. On all the foregoing facts, I conclude that the Respondent's refusal to pay the June 4 COLA was one of the principal reasons the employees struck.

Even assuming that the Union had decided to strike before learning of the Respondent's position on the June 4 COLA, it is fair to infer that the Respondent's unlawful practice, by

[21] Separate questions arise as to (l) whether Respondent could implement the final offer after paying the June 4 COLA on July 28, and (2) whether the Union waived its opposition to implementation of the final offer by executing a contract which was retroactive to June 1. These issues will be discussed infra.

its nature, would have ''a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis for finding'' that the strike, economic in conception, was converted to an unfair labor practice strike from the moment that the workers left the plant. *C-Line Express*, supra at 638. Although the parties were divided over other issues, there can be no doubt that the Respondent's conduct with respect to the COLA payment was of overriding concern to the employees. The Union's original unfair labor practice charge filed on June 4 focused on the Respondent's denial, and was a topic of discussion between Downey and Frakes throughout July. Respondent obviously understood the importance of this matter since Vice President of Operations Luskey admitted that the COLA checks were issued precisely in the hope of ending the strike and wooing the employees back to work. These circumstance offer ample proof that the Respondent's unlawful conduct was central to the issues that ''stood in the way of the parties reaching agreement on a contract'' and thereby ''significantly interrupted and burdened the bargaining process.'' Id. at 638–639.

In sum, I conclude that there was a causal nexus between Respondent's unfair labor practice and the strike which commenced on June 1. The strike continued as a protest of Respondent's unlawful actions at least until August 3 when, after having received their overdue COLA payments, the employees met to decide whether to abandon the strike. The next question to be resolved is whether the strike continued as an unfair labor practice strike after the August 3 meeting.

### Respondent's Failure to Fully Remedy its Unlawful Conduct did not Prolong the Strike

The General Counsel and the Charging Party argue that simply by issuing COLA checks on July 28, the Respondent did not remedy its unlawful conduct in accordance with Board requirements. Consequently, they reason that the employees continued to be unfair labor practice strikers until they offered to return to work unconditionally on August 12.

In support of their argument, counsel rely principally on *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In that case, the Board held that in order to escape liability a respondent's disavowal of unlawful conduct must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. Further, there must be adequate publication of the repudiation to the affected employees, no proscribed conduct by the employer after publication and assurances given to the employees that their employer will not thereafter interfere with the exercise of Section 7 rights.

Little analysis is needed to recognize, as counsel correctly allege, that Respondent's effort to cure its prior misdeed failed to satisfy most of *Passavant's* stringent standards. The COLA checks were not issued until more than 7 weeks after they were due. In *Passavant*, 7 weeks was found to be untimely. Far from disavowing its unlawful act, in the cover letter accompanying the checks, Respondent maintained that its action was proper. That letter also gave no assurance that Respondent would not engage in the same or other unlawful practices again.[22] Further, the Respondent made no effort to compensate the employees for the delay by granting interest on the belated payments, a remedy which is owed to make them whole, as the General Counsel properly contends.[23] Consequently, because the Respondent has not entirely cured its unfair labor practice, complete relief in accordance with the *Passavant* criteria shall be recommended in the remedial section of this decision.

However, it does not follow that because Respondent failed to rectify its unfair labor practice as prescribed by Board precedent that its conduct continued to prove ''an obstacle in negotiations'' or prolonged the strike. *C-Line Express*, supra at 639. As discussed above, not every unfair labor practice is causally connected to a contemporaneous strike. The evidence must establish a nexus between the two. In the present case, proof of causality is lacking. Minutes taken at the union membership meeting of August 3 show that the Respondent's failure to pay the June 4 COLA had no bearing on the employees' decision to continue the strike. Government witnesses who testified about the August 3 membership meeting did not suggest that the Company's former unlawful conduct was mentioned as a possible reason for continuing the strike.[24] Similarly, Secretary Greene's minutes of this meeting show that the Respondent's earlier unlawful behavior played no part in the strike vote. Finally, it is noteworthy that although the Union initially grieved the Respondent's refusal to pay the June 4 COLA, at no time did its request for relief include the payment of interest. On these facts, I find no proof of a causal connection between Respondent's failure to completely cure its unlawful conduct and the employees' decision to continue the strike beyond August 3. *Reichhold Chemicals*, supra at 75.

### Respondent did not Unlawfully Refuse to Provide Information

Paragraph 18(a) of the complaint alleges, in substance, that from July 16 until August 11, Respondent refused to provide the Union with the names of striking employees who would be discharged or were being investigated for possible termination due to alleged picket line misconduct. Paragraph 18(b) further avers that the strike was prolonged, in part, by this refusal. For the reasons set forth below, I find that Respondent acted with reasonable dispatch in supplying the requested information to the Union. Since I do not find that the Respondent violated the Act as alleged, it follows that the strike did not continue as an unfair labor practice protest after August 3.

No real dispute exists as to the legal principles applicable to this facet of the instant case. Thus, it is well settled that an employer has a duty to provide information relevant to the Union's performance of its duties that must be done with reasonable dispatch following a union's good-faith request

[22] General Counsel contends that by failing to furnish the Union with requested information regarding the identity of strikers, Respondent engaged in other unlawful conduct and thereby failed to meet another of *Passavant's* standards. However, I find below that Respondent did not unlawfully refuse to supply the Union with names of employees who might be discharged for strike misconduct.

[23] In *Struthers Well Corp.*, 262 NLRB 1080 (1982), the Board-ordered remedy for the employer's refusal to make COLA payments due under the terms of an expired collective-bargaining agreement included the payment of the COLA with interest.

[24] One employee, Rachel Navarro, testified that she voted to remain on strike because of her continued anger at the Company's conduct in withholding the June 4 COLA. However, Navarro did not suggest that she or any other employee expressed this view publicly at the August 3 meeting. Therefore, I cannot conclude that her reason for prolonging the strike was widely shared.

which is sufficiently clear to place the employer on notice as to the information requested. See generally *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1955).

As set forth in the fact statement, and as pleaded in the complaint, the Union first raised the subject of possible discharges for strike misconduct on July 16. At a collective-bargaining meeting on that date, Frakes simply asked ''if anyone would be discharged and if so, who?'' His inquiry implies that he assumed the Respondent had made such decisions already. He did not ask for the names of those who might be or had been investigated.

I credit Downey's testimony regarding her response to Frakes. She told him candidly that although some employees might be fired she had no names to give him for the Company had not made such decisions, and in fact, was holding the matter in abeyance. She further explained that the Company had not even determined who might be investigated but that each such individual would have an opportunity to present his version of the alleged offense. Frakes did not pursue the matter further; he did not even ask when such decisions might be made. Given Frakes' background as a seasoned negotiator, he certainly knew how to frame a clear and specific request for information if that was his intent. Instead, his question seemed to be posed casually and in an off-hand manner. Downey did not attempt to conceal information. Her failure to provide names on July 16 cannot be taken as a refusal to provide information. She could not give what did not exist.

Frakes did not return to this topic until July 27. Prior to that date, the employees attended a union membership meeting on July 17 at which time they agreed to continue the strike. Frakes conceded that no questions were raised at the meeting about discharges and he did not mention that the Company had refused to provide information. Frakes and Downey spoke next by phone on July 23 at which time he assured her that if the June 4 COLA was paid, he could get the employees back to work if they had all their jobs back. Notwithstanding Frakes'concern with assuring positions for all employees, he did not request information about individual investigations or potential terminations.

When Downey informed Frakes during a July 27 telephone call, that the the COLA checks would be issued, he asked whether that meant that all the employees could return to work. Downey replied with a nonsequitur; in effect, she said that the Company had not turned away anyone who had offered to return to work. Frakes then mused that some employees might be fired for strike misconduct and suggested that the Union could grieve any discharge decisions which it disputed. Frakes may have assumed that he impliedly had renewed his July 16 request for the names of those who would be discharged, but he did not literally request such information from Downey. Even if his generalized comments could be construed as a request, Respondent did not withhold information for at that time no one in management had focused on which of the strikers might be dismissed. In fact, apart from an effort during the first week of the strike to marshall evidence in support of a preliminary injunction, Respondent's officials had not reviewed any data to determine which employees would be investigated because of alleged picket line misconduct.

On July 28, or shortly thereafter, the employees received their COLA checks with a cover letter advising them that they would be permanently replaced unless they returned to work by August 5. Notwithstanding this deadline, Frakes attempted to reach Downey by phone only once on July 31. When that proved unsuccessful, he did not try to call her again although he had her itinerary and phone numbers.

Before his next contact with Downey, Frakes met with the union members on August 3. He and the Union's attorney informed the members that the NLRB had not determined whether the strike would be considered an unfair labor practice or an economic strike now that the June 4 COLA payment was no longer an issue. Frakes further stated that the Company would not take back at least six of the strikers, and that the Union would file a charge accusing the Company of refusing to supply the names of those who would be terminated. The membership then voted to continue the strike and directed Frakes to obtain those names and make one final effort to wrest better terms from the Respondent at a bargaining session scheduled for August 11.

Although the need for the names of possible dischargees was purportedly urgent, Frakes made no effort to telephone or cable management. Instead, the Union's next contact with Respondent was via a letter dated August 3 in which for the first time, Frakes specifically requested the names of strikers who allegedly committed acts of misconduct on the picket line, the dates of such occurrences and the substance of the alleged offense. This also was the first time that the Union had asked for information about employees who might be investigated, rather than those whom the Company had decided to discharge.

A second letter followed on August 4 to correct inaccurate dates recited in the previous writing. Both letters alleged that Downey had refused Frakes' two prior requests for information about ''striking employees who, according to the Employer have forfeited their reinstatement rights due to 'misconduct' during the strike.'' Based on findings set forth above, this accusation was groundless.

Further, both the August 3 and 4 letters asserted that the refusal to supply this information was ''of major concern to the Union'' and ''a stumbling block in our negotiations.'' Notwithstanding this claim, both letters were sent by regular mail and did not reach Downey's San Francisco office until at least 4 days later. No copy was sent to Luskey, although he was Respondent's senior official on site. On August 4, before the letters could reach their destination, the Union filed an unfair labor practice charge based on the alleged refusal to furnish information. If time was of the essence, and indeed it was, the Union could have telegraphed its request or rushed the letters by express mail, a form which the Union used when sending an unconditional offer to return to work on behalf of the strikers a week later. Since Frakes had Downey's complete itinerary, he could have attempted to reach her by phone. The Union's lack of diligence in this affair wholly defeats its contention that the failure to obtain the requested information was a stumbling block to negotiations.

I do not imply that the union members had no legitimate need to obtain the requested information, nor do I suggest that they were disinterested in determining whether some of their fellow workers might be discharged. However legally justified the inquiry may have been, the Union's dilatory behavior indicates that it did not pursue the quest for information with a real sense of urgency or view the receipt of the names as critical to further negotiations. Instead, it appears

that the Union may have charged the Respondent with a refusal to supply information in an effort to protect its members as unfair labor practice strikers until one last effort could be made at the August 11 bargaining session to seek amnesty and improve the terms of the final offer.[25] As the Court observed in *Soule Glass Co.*, supra, 652 F.2d at 1080

> . . . in examining the union's characterization of the purpose of the strike, the Board and the court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context.[26]

Within several days after Downey received the Union's request she and Luskey reviewed the available documentation and prepared an appropriate response which she delivered to Frakes on August 11. Her prompt attention to the Union's inquiry was typical of the way that Downey did business. Never before had she deprived the Union of information. She had no conceivable reason to withhold such information on this occasion and indeed did not do so. When she received a clear and specific request, she responded with more than reasonable dispatch. See *Snively Groves, Inc.*, 109 NLRB 1394 (1954). Downey's and Luskey's conduct on behalf of the Respondent in this regard did not violate the Act.

In sum, when the entire factual actual context is considered, it becomes evident that the Respondent's purported refusal to supply information did not really hinder negotiations. Further, the Respondent did not unlawfully refuse to supply information as alleged in the complaint and, thus, was not guilty of violating the Act. Therefore, even if the employees voted to continue the strike in part on the good faith but mistaken belief that the Respondent had willfully refused to supply the names of potential discharges, that belief does not alter the legal status of the strike. See *Burlington Homes*, 246 NLRB 1029, 1045 (1979).

Since the Respondent did not commit an unfair labor practice by refusing to divulge names in a timely manner, the strike may not be characterized as an unfair labor practice strike after August 3. Instead, on that date, it became a strike addressed solely to economic issues. At this juncture, with the parties at impasse only over contract terms, the Respondent could lawfully implement its final offer.

## Reinstatement Issues

Since the work stoppage was converted to an economic strike on August 3, the workers then became economic strikers. As a matter of law, the Respondent then was entitled to and did hire permanent replacements on August 5, as it informed the Union it would do if the strikers failed to return to work by that date.[27] Thereafter, the Respondent had no legal duty to reinstate former strikers who unconditionally offered to return to positions held by permanent replacements.[28] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). Subsequent to Respondent's recall to fill remaining vacancies, 15 union members properly were returned to work on August 17 under the operative terms of the final offer. Given the foregoing conclusions, claims that the employees were unfair labor practice strikers entitled to immediate reinstatement when they unconditionally offered to return to work are without merit.[29]

Of course, economic strikers remain employees indefinitely even after they are replaced, and are entitled to reinstatement to current or future vacancies as they arise. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). In accordance with *Laidlaw*, Respondent is required to offer positions to employees listed in paragraph 19(f) of the complaint as vacancies occur, with the exception of those who subsequently retired, resigned, or were justifiably terminated for strike misconduct.[30]

The complaint alleges in paragraphs 20(b) through (d) that Respondent improperly delayed reinstating four named employees for varying periods of time. Such delays are unlawful ''unless the employer can show that his action was due to 'legitimate and substantial business justifications.''' *NLRB v. Fleetwood Trailers Co.*, 389 U.S. 375, 379 (1967). The Respondent submits that the delay in reinstating each of the workers named in the complaint was based on legitimate business concerns. I find support in the facts and the law for Respondent's position.

A preliminary question here is whether the Respondent had good cause to recall the former strikers and begin interviews with employees accused of picket line misconduct on August 17 rather than August 14, the date that the Union offered to return. In addressing this issue, Respondent presented uncontroverted evidence that time was needed to arrange job manning and production schedules, thereby making

[25] Although a request for the names of strikers accused of strike misconduct and a request for amnesty may share a common purpose, they are not interchangeable. The former looks to the receipt of specific names; the latter seeks group relief regardless of individual wrongdoing.

[26] Quoted in *C-Line Express*, supra at 638.

[27] All but one of the permanent replacements were hired prior to August 5. However, they were terminated on August 4 and rehired on August 5 when the strikers failed to return to work.

The Charging Party submits that the strikers should have been afforded a reasonable period of time—until August 14—to receive the names of strikers who might be discharged and of strike replacements, so that they could evaluate the bona fides of Respondent's intent to reinstate all of them on August 4. If the employees truly wanted to test Respondent's word, the most reliable method would have been to appear for work on August 4. Alternatively, if the requested information was as crucial as alleged, the Union could have requested that the Respondent extend the August 4 deadline until it was received and evaluated.

[28] The General Counsel and Charging Party contend that the Respondent wrongfully continued to hire strike replacements after receiving the Union's offer to return to work at noon on August 13. The Union separately argues that the Respondent had a duty to refrain from hiring replacements after it learned informally prior to August 13 that an offer to return was forthcoming. Luskey admitted to hearing ''a rumor'' that the employees would offer to return, but he had no confirmation of this fact, and no knowledge of when the offer might be transmitted. The record also shows that a permanent replacement started working on August 13 after previously being interviewed and taking a physical exam, before Luskey had the Union's offer in hand. In these circumstances, I do not find that the Respondent acted improperly by putting a replacement employee to work on August 13.

[29] These same conclusions also make it unnecessary to decide whether, by subsequently ratifying a collective-bargaining agreement in November, which was retroactive to June 1, the employees waived their right to backpay and other benefits which would have been due if the expired agreement were still in effect. The parties' arguments regarding waiver were premised on assumptions which have not been adopted; that is, that the Respondent's unfair labor practices prevented it from legitimately implementing its final offer prior to the date the Union ratified the successor contract and that the workers retained their status as unfair labor practice strikers.

[30] Uncontroverted evidence shows that former employees Bint, Cules, Fregonara, Grabowski, Mackay, and Macklin resigned or retired on various dates in 1988 and thereby extinguished their reinstatement rights. In addition, Dallas Easterwood and Timothy Kersmen have been on physical disability leaves since before June 1, 1987, and although offered reinstatement on August 17 were unable to return to work.

August 17 the earliest feasible date on which it could arrange for the efficient return of the strikers. Evidence also was adduced that the Company had a consistent practice of recalling employees from layoff at the start of a new workweek, which in this case was August 17.

The date selected to recall the former strikers was within the 5-day period that the Board has found ''justified as providing a reasonable period of time for employers to accomplish those administrative tasks necessary to the orderly reinstatement of the unfair labor practice strikers.'' *Drug Package Co.*, 228 NLRB 108, 113 (1977), enfd. in part 570 F.2d 1340 (8th Cir. 1978). An employer also needs time to attend to administrative tasks in recalling economic strikers and to prepare for investigatory interviews with strikers accused of picket line misconduct. Furthermore, the Respondent had reason to believe that employees would be unwilling to attend such interviews until the strike had ended and their coworkers had returned to work.

I turn next to the evidence regarding the reinstatement of four employees named in the complaint. The Respondent asked George Psykala and Howard Kaechle to report to the facility on August 17 for investigative interviews to determine whether discharges were warranted for alleged strike misconduct. Based on these interviews, the Company decided not to discharge either man and sent mailgrams offering them reinstatement.[31] Psykala returned to work on August 19, the day after receiving notice of his reinstatement. Kaechle did not respond to a mailgram but on August 20 encountered Luskey by chance, and acceded to his request that he apologize to the manager in question. Kaechle offered his apology the following day and returned to work on August 24.

Respondent had a legitimate interest in investigating incidents of alleged strike misconduct before returning suspected perpetrators to the plant. After conducting a brief review of the facts related to Psykala's alleged misconduct, Respondent promptly reinstated him. The delay in reinstating Kaechle was not the Company's doing. Kaechle offered his apology just 1 day after Luskey was able to reach him, but that fell on Friday, August 21. His reinstatement took place on Monday, August 24, the start of a new workweek when the Company customarily recalled laid-off workers. Based on these facts, I do not find that Respondent wrongfuly delayed reinstating either Psykala or Kaechle.

The complaint further alleges that Respondent unlawfully failed to reinstate George Mamer until September 14 and James Cole until November 23. However, Respondent presented uncontroverted evidence that Mamer was recalled according to plant seniority by classification as soon as there was an opening for another mechanic. Cole was recalled on November 20 to fill a vacancy created when Respondent discharged a permanent replacement whose skills proved unsatisfactory. However, Cole had accepted a position with another firm on June 2 and rejected the job offer. Given this uncontradicted evidence, I conclude that Respondent adduced evidence showing legitimate business reasons to justify its delay in offering reinstatement to both Mamer and Cole.

[31] Psykala, interviewed about a single nail-throwing incident, was absolved when Respondent was unable to prove that any property damage occurred. Kaechle, who was accused of yelling at a company manager and asking a repairman not to enter the facility, redeemed himself by apologizing to the manager.

### The Discharge of Employees for Picket Line Misconduct

In the several months following the strike's cessation, the Respondent interviewed each of the 12 employees whose names had been provided to the Union. Subsequent to these interviews, Respondent discharged 7 of the 12.[32] During the trial in this case, I granted the Government's motion to amend counts in the complaint, effectively dismissing allegations of discrimination with respect to former employees Jerry Helton and Manuel Medina. The remaining allegations deal with the propriety of Respondent's decisions to terminate Mary Louise Witmer, Patricia Gomez, Michael Nowak, Mary Suyak, and Ursula Binder.

### The Legal Framework

It is well settled that employees who have committed serious acts of strike-related misconduct are not entitled to reinstatement. However, if an employer defends its refusal to reinstate an employee on these grounds, it need not prove that the accused employee actually committed the acts alleged; only that it had an honest belief in the employee's guilt. If the Respondent succeeds in making this showing, the General Counsel then bears the burden of proving either that the employee was not responsible for the acts alleged or that the conduct was not serious enough to warrant discharge. *Gem Urethane Corp.*, 284 NLRB 1349, 1354 (1987). In determining what sort of conduct will be regarded as sufficiently egregious to justify discharge, the Board has adopted an objective test which asks ''whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.''[33] In addition, the General Counsel submits that where appropriate it is necessary to balance the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike.'' *NLRB v. Thayer Co.*, 213 F.2d 748, 755 (1st Cir. 1954). In accordance with these standards, I next review the evidence bearing on the discharges of the five employees named in the complaint.

### Mary Louise Witmer

Respondent cited two incidents in which Witmer allegedly was involved: blocking the ingress of a truck-trailer and throwing rocks at a car.

In the first incident, which occurred soon after the strike began, Witmer, with a number of other employees, blocked a truck, preventing it from entering the plant grounds for approximately 20 minutes. Witmer had no recollection of the incident although Luskey identified a photograph which was taken at his direction, showing that she did engage in this blocking episode. However, Luskey acknowledged that Witmer would not have been discharged for participating in this episode alone. Moreover, other employees who engaged in blocking suffered no sanctions. Therefore I am inclined to believe that Respondent regarded this incident as a

[32] Of the five who were not discharged, only one, Kaechle, was senior enough to return to work. Psykala also was reinstated after he was interviewed, but his name was not on the list which Downey gave to Frakes on August 11.

[33] *Clear Pine Mouldings*, 268 NLRB 1044 (1984), quoting *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977).

makeweight, basing its decision to discharge Witmer principally on her involvement in a second incident.

On July 24, Scott Scribner, an applicant for employment, was driving away from the plant in his 1977 auto. He observed five women picketing on the right-hand side of the road, the last of whom had her hand raised in a clenched fist as if to throw something. As he drove past them, he heard a clanking sound on the right rear side of the car. Shortly after leaving the area, he stopped to examine his car, finding five or six small chips and one dent on the right rear side of the vehicle which he had freshly painted the month before. While Scribner was at a medical clinic taking a pre-employment physical exam, Plant Manager Cliff Krieger, who had heard about the incident, telephoned him to determine what had happened. Scribner told Krieger about his experience and described the woman he believed was responsible as short, chunky, black-haired Mexican in appearance, wearing black shorts and a pink top. Krieger confirmed that this description fit Witmer, the same person who two security guards at the scene had identified as the person who had thrown stones at the car. Later that day, Scribner filed a police report. However, he did not have his car repaired or obtain an estimate until a month later. Then, on August 19, after Krieger asked him for a statement about the incident, Scribner took the plant manager's advice and obtained an estimate for $131.

At her discharge interview, Witmer said she could not recall such an event; at the trial she stated emphatically that she never had thrown anything other than a wad of paper at passing cars. Two fellow employees who had picketed with Witmer on July 24 testified that they had not seen her throw anything at all.

Scribner seemed to be a completely impartial witness; he did not invent the damage to his car and had no discernible reason to point a finger of blame at Witmer rather than at one of the other women with her. Further, two security guards identified Witmer as the perpetrator.

In assessing Respondent's motivation in this matter, I bear in mind that Luskey and Downey did not seem to approach these interviews intent on ridding the Company of as many union supporters as possible, since they recalled as many of the employees as there were vacancies, and retained five of those who were investigated, two of whom had sufficient seniority to return to work. Thus, there is no evidence that Respondent was motivated by antiunion animus in terminating Witmer or, indeed, any of the other employees who were discharged. I further note that the proper test against which to measure these discharge decisions is whether Respondent held an honest belief in a striker's culpability, not whether that striker was guilty beyond a reasonable doubt. Given these considerations, I am persuaded that the Respondent's officials honestly believed that Witmer was responsible for the damage to Scribner's car and discharged her principally for this reason.

Witmer's testimony was predictably self-serving and not very reliable given her inability to acknowledge blatant misconduct by another striker, Medina, that was committed in her presence. Although two witnesses testified in Witmer's behalf, their efforts to vindicate her were weakened by the fact that they could not have observed her at every moment during the entire picketing shift. Therefore, I do not find their testimony sufficiently convincing to overcome evidence of Witmer's wrongdoing.

Whether Witmer's conduct was egregious enough to warrant discharge raises a separate issue. Addressing this problem in *GSM, Inc*., 284 NLRB 174 (1987), the Board reversed an administrative law judge who found that kicking, slapping, and throwing beer cans at moving vehicles was '''relatively innocuous' because they were 'unaccompanied . . . by verbal or other intimidating conduct,' because the strikers themselves 'did not exhibit any threatening or violent demeanor'. . . and/or because their assaults did not actually damage those vehicles.''' Id. at 174. Without considering whether the employer's unfair labor practices had provoked the strikers in accordance with the *Thayer* doctrine, the Board found that such conduct

> is intimidating enough in and of itself without being accompanied by additional threats. . . . [W]hile such conduct might be ''relatively innocuous'' when measured against more violent behavior, it nevertheless is violent conduct which may reasonably tend to coerce or intimidate employees in the exercise of their rights protected under the Act.

See also *Western-Pacific Construction Co*., 272 NLRB 1393, 1395 (1984), affd. 782 F.2d 839 (9th Cir. 1986).

I have little doubt that Witmer threw some stones or, more likely, pebbles at Scribner's car.[34] It also seems clear that her conduct comes within the type proscribed in *GSM, Inc*. However, on the evidence presented here, it cannot be said that under all the circumstances her conduct coerced or intimidated any employee. *Clear Pine Mouldings*, supra. Indeed, the evidence affirmatively suggests that the single employee involved was not at all affected by the experience. Scribner obviously was nonchalant about the matter; it did not occur to him to file a police report until Krieger's question planted the idea in his mind; he did not intend to repair his vehicle and, in fact, did not even obtain an estimate until Krieger requested that he do so some 3 weeks after the fact. He did not report the matter to the Company until asked to do so. No evidence was introduced at the trial that any other employee saw or heard about this incident. Hence, there was no showing that any employee tended to be or was in fact intimidated by Witmer's act. Consequently, Respondent has no lawful reason to deny her reinstatement.

In reaching this conclusion, I recognize that Respondent did not act with antiunion animus and, therefore, did not violate Section 8(a)(3). At the same time, Witmer was discharged unjustifiably while engaging in protected concerted activity. Therefore, in terminating Witmer, I conclude that Respondent violated only Section 8(a)(1) of the Act.[35]

### Patricia Gomez

Gomez was terminated for her alleged involvement in three incidents: putting a nail-studded piece of wood under the tire of a truck leaving the facility on June 8; threatening

[34] I doubt that Witmer threw rocks (a term which implies objects more massive than stones or pebbles) as Respondent alleged, for she is a small woman, and by Scribner's own account, threw only what she could hold in one hand.

[35] Proof of discriminatory intent is not necessary to show that an employer's conduct reasonably tended to interfere with, restrain, or coerce an employee under Sec. 8(a)(1). *Roadway Express*, 250 NLRB 393 (1980).

and swearing at Luskey, and striking an employee's car with a picket sign.

On June 8, while standing on the Company's loading dock, Company Purchasing Manager Greg Zalut saw Gomez, who was some 40 feet away, carry a two-by-four piece of wood to the front of a truck as it was leaving the premises. Zalut momentarily lost sight of Gomez and did not see her throw anything. However, he did see a board flipping around in the street. When Gomez came back into Zalut's view, she was empty handed, but then, she picked up two pieces of wood lying in the street and tossed them aside. Minutes later, Luskey contacted the truckdriver and learned that the tire on the driver's side had been punctured by nails and was losing air.

Several weeks later, aided by binoculars, Zalut again saw Gomez throw a small piece of wood in the path of an exiting truck. When the truck was gone, he observed her collect a few pieces of wood and toss them under a parked van. He reported the matter to Luskey, but he did not raise this during her interview.

The second incident occurred as Luskey was leaving the plant to escort temporary replacements. He testified that Gomez shouted in a threatening manner that he ''better not try to . . . bring these people into the plant.'' Gomez admittedly followed Luskey in her car to see where he was meeting the replacements. Luskey further stated that on his return, as he was crossing the picket line with the replacements, Gomez shouted an obscenity at him.

A replacement employee, Marian Ward, who met Gomez when she first worked at the plant several years before, testified about the third incident. As Ward was riding in a car toward the plant, Gomez, in a band of strikers, hit the hood of the vehicle on the passenger side with a picket sign. However, the car was unharmed.

As in the Witmer case, I find sufficient evidence to support the Respondent's claim that it acted upon an honest belief in Gomez' guilt. While Zalut was some distance away from Gomez, he had no reason to single her out from the rest of the picketers. Neither Luskey nor Ward had any motive to place blame on her either. Ward, in particular, did not impress me as being at all vindictive. If Respondent wanted to bolster its case against Gomez, Zalut could have insisted that he saw the entire incident. Instead, he only related as much as he observed. It is not critical that he did not actually see Gomez throw the wood; a strongly supported inference alone will suffice to establish Respondent's good-faith belief in her liability.

I do not find that Gomez' denials of wrongdoing were anymore compelling than Witmer's. Indeed, by admitting that she followed Luskey's car, Gomez revealed a keen interest in the replacements. It takes little imagination to translate that interest into anger which led her to commit the acts as alleged. Assertions by fellow strikers that they did not see Gomez throw any wood suffers from the same deficiency that impaired the testimony of Witmer's witnesses; that is, they could not attest that they observed her 100 percent of the time. I conclude, therefore, that the General Counsel has not established Gomez' innocence. Overall, her conduct exceeded the bounds of protected strike activity. Accordingly, Respondent is not obliged to reinstate her.

Mary Suyak

Suyak was interviewed about her alleged role in two offenses: taking a cap from an employee while threatening him, and spraying cars with an abrasive liquid.

Employee Anthony Edwards testified that as he drove to work on June 1 with his car window half open, Suyak, whom he knew casually, reached in, seized a Mohawk baseball cap from his head, and told him he would not get it back until she returned to work. Edwards, who claimed that this remark made him nervous, reported it immediately to Luskey. Suyak admitted taking the cap but said it was merely a joke. She did not recall making the comment that Edwards attributed to her. Edwards' apprehension hardly seems reasonable given Suyak's harmless words and deed. I fail to see any threat implied by her comment. Considering that Edwards was crossing a picket line on the first day of the strike when the employees just had learned they were losing their earned bonus, it is easy to imagine that Suyak viewed Edwards' Mohawk cap as if it were a matador's cape. Standing alone, this incident is too trivial to rise to the level of a dischargeable offense. See *Superior Bank*, 246 NLRB 721, 724 (1979).

Three company employees, who were driving one behind the other in caravan style was they left work on June 23, testified about another incident involving Suyak. Production Planner Robert Clemens stated that he was driving directly behind employee Peg Burns and Greg Zalut when he saw Suyak on the right-hand side of the road holding a squirt bottle. As the two cars ahead of him passed her by, he saw Suyak squirt each one with a clear liquid. Clemens said that he swerved away but stared directly at Suyak, causing her to conceal the bottle behind her back. Clemens talked to Zalut and Burns the next day and on examining their cars observed streak marks along the passenger side which appeared to have been caused by dissolved paint. He reported the matter to Luskey and gave a statement to the police early the next week.

Zalut's testimony is consistent with Clemens'. As he slowly drove by, he saw Suyak with her hand raised holding a squirt bottle. The next instant, he found his windshield streaked with what he initially thought was water. He tried to clean the window with his windshield wiper but when this worsened matters, he stopped at a gas station to clean the window more thoroughly. At that time, he was unaware that any liquid had spilled onto the body of the car. It was not until he washed his car over the weekend that he found streak marks on the passenger side, roof, and trunk of the car. On Monday, June 29, he obtained an estimate of over $500 to repair the damage, a copy of which he gave to Luskey.

Peg Burns, formerly an accounts receivable manager with Respondent, explained that she was intent on following Zalut as closely as possible when they left the plant. Therefore, although she saw Suyak holding a bottle, she did not observe her squirting anything from it. Not until early the next morning when Clemens asked if her car was damaged did she inspect it and discover that some oily substance had streaked and discolored its top and side.

Suyak disclaimed responsibility for damaging these vehicles both at her interview and at trial. The General Counsel and Charging Party presented no witnesses in Suyak's behalf. Instead, they made much of the fact that Zalut and Burns did not discover the damage to their cars right away so that

someone other than Suyak could be responsible. They also pointed out that inconsistent dates were cited for the occurrence. Neither of these defenses disturb the conclusion that Respondent acted upon an honest belief that Suyak was responsible for causing fairly extensive property damage. Both of the questions raised by counsel are easy to explain. Burns did not refer to a date which differed from the one mentioned by Zalut and Clemens. Rather, the record shows that Respondent's counsel inadvertently proposed an incorrect date in posing a question to Burns. Luskey, too, merely cited the date on which reports were made to him, rather than the correct date of the incident. Regardless of this slight confusion, it is clear that Clemens, Zalut, and Burns all recalled and spoke of the same event. Further, Zalut's and Burns' failure to observe the damage to their cars immediately may be due to the fact that the spray was colorless and the car paint apparently did not corrode instantaneously. In any event, even if I were to conclude that the General Counsel and Charging Party succeeded in creating a reasonable doubt about Suyak's culpability, that is not enough to satisfy the burden of proving she did not commit the offense. Accordingly, I conclude that Suyak was lawfully discharged.

Michael Nowak

Respondent interviewed Nowak about three incidents, the first of which involved blocking ingress of a truck on June 5, together with Witmer and other employees.

He also was charged with a more serious offense: throwing nail-spiked wood under the tires of a truck departing from the plant on June 5. Using binoculars from a vantage point in the plant, Luskey observed Nowak running along the driver's side of an exiting leased truck as another striker, Jerry Helton, ran on the passenger side. Both men tossed pieces of wood under the truck's tires. After the truck departed, Luskey saw Nowak retrieve the wood. About an hour later, the truck's lessor called Luskey to inform him that pieces of wood with nails countersunk into them had pierced and flattened several of the truck's tires. A police report was filed by the driver the same day.

Employee Diane Reno testified about a third incident which occurred on August 7. As she was returning to work after lunch in a car driven by a coworker, Connie Johns, a stone hit the car making a small chip in the windshield. Johns stopped the car and walked over to a group of strikers on the roadside. Nowak then stepped out in front of the group and hurled several obscenities at her. Johns and Reno immediately reported the encounter to Luskey and filed a complaint with the police the same day.

At his interview and in this proceeding, Nowak denied having thrown wood under a truck or a stone at John's car. Some months after the latter incident, Luskey learned that neither Johns nor Reno had seen anyone throw the stone at the car. (Apparently, they assumed Nowak was responsible because he had stepped forward when Johns left her car.) Luskey indicated at the trial that based on this new qualifying information he reassessed his decision to terminate Nowak and concluded that his discharge still was warranted based on the seriousness of Nowak's participation in the June 5 wood-throwing incident. See *Roure Bertrand Dupont, Inc*., 271 NLRB 443, 444 (1984).

In light of the information which Luskey had on hand at the time of Nowak's discharge, it is clear that the Company possessed sufficient evidence to form an honest belief that Nowak had engaged in three incidents of strike-related misconduct. Respondent would concede that Nowak's participation in the June 5 blocking episode was not enough standing alone to justify discharge. Luskey further suggested that reliance on the incident involving John's car probably was unsound. Therefore, the General Counsel only had to establish that Nowak was not involved in damaging a truck on June 5.

When a truck leaves a facility with its tires intact, passes over pieces of wood thrust in its path, and shortly thereafter winds up with flat tires caused by punctures made by nails countersunk in wood, a reasonable person would infer a causal connection between these events. Such an inference is warranted here. The best that can be said in Nowak's defense is that the evidence failed to prove whether he or Helton bore greater responsibility for spiking the truck's tires. In *GSM Inc*., supra at 174–175, the Board found that even in the absence of evidence that a striker was directly engaged in coercive or intimidating conduct, ''his active cooperation with pickets engaged in such conduct justified his discharge.'' Similarly, although there is no proof that Nowak handled wood with nails embedded in it, he joined in a venture with someone who apparently did. It is clear that he and Helton were bent on doing some mischief to the truck and must accept responsibility for the consequences of their acts. Thus, his ''active cooperation with [Helton] in such conduct justified his discharge.'' Ibid.

Ursula Binder

Ursula Binder was interviewed in mid-October about incidents which occurred on July 20: throwing rocks at and spraying paint remover on a car.[36]

Joaquin Guerrero began working for Respondent in the guise of a newly hired employee. In reality, he was employed by a business loss prevention firm and assigned to work at the Mohawk plant to detect possible thefts or sabotage by new hires. As he drove toward the facility on July 20, a woman whom he later described as blonde-haired, approximately 5' 9'' tall, wearing a red tank top, blue jean shorts, and sandals, began yelling obscenities at him.

When leaving the plant, Guerrero (who used the alias Hernandez at work) noticed the same woman holding a squirt bottle walk toward the driver's side of his car. He began rolling up his window just as she squeezed the bottle, spraying the side of his car with some liquid. He left the immediate vicinity but stopped minutes later to telephone the police and his supervisor, Dominowski. Guerrero inspected his car to find paint dripping down a wide swath on the driver's side. When his supervisor arrived, Guerrero explained what had happened and described the woman he had seen squirt his car.

Dominowski telephoned Luskey and told him about the incident. Then he drove to the facility and seeing only one picketer who fit Guerrero's description, photographed her as she was approaching a white automobile. Guerrero identified the woman in the photo as the same person who squirted his

[36] Binder was out of the area until the time of her interview. Although Luskey questioned her about throwing rocks, Respondent did not pursue this allegation at the instant hearing.

car. It was Ursula Binder. Guerrero subsequently obtained an estimate of over $1000 to repaint the vehicle.

Binder adamantly denied any complicity in this episode. However, she acknowledged that she generally fit Guerrero's description, that she was the person in the photograph and, as the photo showed, was approaching her white car at the end of her picket line tour of duty. Based on the accuracy of Guerrero's description and proof that extensive damage was done to his car, Luskey formed an honest belief in Binder's guilt.

The General Counsel points to some slim evidence that indicated another woman picketer may have fit the description given by Guerrero. However, the government did not produce her as a witness in order to determine whether she was picketing on the date in question, whether she owned the same clothing that Binder wore on that occasion, or whether Guerrera truly mistook Binder for her. The government, not the Respondent, has that obligation since it bears the affirmative duty to establish innocence.

The Charging Party further suggested in its brief that presenting a single picture of Binder to Guerrera, rather than a photo array, was impermissible suggestive. The strictures of criminal procedure do not set the standards for appropriate conduct in this forum. Counsel have made a valiant effort to cast doubt on Guerrera's identification of Binder, but they have not established, in accordance with Board standards, that she did not commit the wrongful act for which she was discharged.

## CONCLUSIONS OF LAW

1. Mohawk Liqueur Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Industrial Employees Union, Local 42, Distillery Rectifying, Wine and Allied Workers' International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive bargaining agent for purposes of collective bargaining within the meaning of Section 9(a) of the Act of employees in the following appropriate bargaining unit:

> All full-time and regular part-time employees employed by Respondent at its facility located at 42700 Mohawk Drive, Novi, Michigan, but excluding Teamsters, salesmen, professional employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain in good faith with the Union in that it failed and refused to pay a cost-of-living allowance (COLA) due under an unexpired collective-bargaining agreement; insisted to impasse that the Union forgo and/or bargain about the accrued and vested COLA as if it were a mandatory subject of bargaining; and unilaterally implemented the terms and conditions of its final offer without having reached a valid impasse on June 1 until August 3, 1987.

5. The strike, which commenced on June 1, 1987, was caused and prolonged in part by the Respondent's unfair labor practices and, thus, was an unfair labor practice strike from its inception until on or about August 3, 1987. After that date, the strike continued as an economic strike. The Respondent was lawfully entitled to implement its final offer on or about August 4 and hire permanent replacements from August 5 until August 13, when it received an unconditional offer to return to work submitted by the Union on the employees' behalf.

6. The Respondent violated Section 8(a)(1) of the Act by discharging employee Mary Louise Witmer for engaging in protected concerted strike activity.

7. The Respondent's unfair labor practices referred to above affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Allegations in the consolidated complaint which were found to lack merit shall be dismissed.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action set forth below designed to effectuate the policies of the Act, including the posting of an appropriate notice to inform employees that it will not engage in further vioations of the Act.

In addition, having found that Respondent withheld the cost-of-living allowance owed employees from June 4 to July 28, 1987, I shall order Respondent to make whole all employees who were members of the bargaining unit during the period of time that the COLA accrued by paying them interest on the COLA amount computed in accordance with Board policy.

Lastly, I shall recommend that Respondent offer Mary Louise Witmer immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, discharging if necessary any replacement. Respondent also shall make Witmer whole for any loss of earnings she may have suffered by reason of her unlawful discharge by paying to her a sum of money equal to the amount she would have earned as wages from August 17, 1987, to the date Respondent offers full reinstatement, less net earnings acquired by her during this period. The amount of backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall be ordered to expunge from its records any reference to Witmer's unlawful discharge, give her written notice of such expungement, and advise her that its unlawful conduct will in no way be used for further personnel actions against her.

On these findings of fact and conclusions of law and on the entire record, and I issue the following recommended[37]

## ORDER

The Respondent, Mohawk Liqueur Company, Novi, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the General Industrial Employees Union Local 42, Distillery, Rectifying, Wine and Allied Workers' International Union, AFL–CIO, as

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the exclusive bargaining agent of its employees in the appropriate unit described in paragraph (b) below, failing to pay a cost-of-living allowance as provided in the parties' collective-bargaining agreement; insisting to impasse that the Union bargain about or agree to forgo an accrued COLA; and unilaterally implementing the terms and conditions of a final offer without bargaining to a lawful impasse.

(b) The appropriate bargaining unit is:

> All full-time and regular part-time employees employed by Respondent at its facility located at 42700 Mohawk Drive, Novi, Michigan, but excluding Teamsters, salesmen, professional employees, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

(c) Discharging employees because they engaged in protected concerted strike activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees who were members of the appropriate bargaining unit for any loss they may have suffered by Respondent's delay in paying the COLA due on June 4, 1987, by paying interest to them computed in accordance with Board policy.

(b) Offer Mary Louise Witmer immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for all earnings lost by reason of her unlawful discharge, as set forth in the remedy section of this decision. Delete from its files any reference to her discharge, notify her in writing that this has been done, and that the discharge will not be used against her in future personnel actions.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due to Witmer and the amount of interest on the COLA payments due to members of the bargaining unit.

(d) Post at its Novi, Michigan place of business copies of the attached notice marked ''Appendix.''[38] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''